No. 89-321

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CLYDE SANDOZ MASONRY,
d/b/a GRIFFIN MASONRY,
Petitioner,
v.

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

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BRIEF FOR RESPONDENTS IN OPPOSITION [1]

STATEMENT OF THE CASE [2]

This case arises under the Multiemployer Pension Plan Amendments Act ("MPPAA" or "Act"), which amended the Employee Retirement Income Security Act ("ERISA") to establish that participating employers who cease contributing to a covered pension fund are, in certain circumstances, liable to the fund for "withdrawal liabil-

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[1] Throughout this Brief, the Petition for Certiorari will be referred to as "Pet." Citations to the opinion below will be to the Appendix to the Petition and will be referred to as "A."

[2] For purposes of this brief, we accept petitioner's statement of the particular circumstances of this case.

ity."[3] The structure of the Act was described in the opinion below (A. 3-4):

> The Act requires employers who cease contributing to a multiemployer fund to pay what the statute refers to as "withdrawal liability," a sum that represents a portion of the fund's "unfunded vested benefits." See 29 U.S.C. §§ 1381, 1399 * * *.
>
> That sum is based upon the employer's date of "complete withdrawal" from a multiemployer plan. *See id.* §§ 1383, 1391. Special provisions define the "complete withdrawal" of employers, like Sandoz, engaged in the construction and building trades. See *id.* § 1383(b).
>
> The MPPAA grants the plan sponsor broad authority to assess and collect withdrawal liability. The Act requires that the fund "[a]s soon as practicable after an employer's complete . . . withdrawal" (1) calculate the employer's withdrawal liability, (2) set forth a schedule of payments, and (3) demand that the employer make payments pursuant to that schedule. See *id.* § 1399(b)(1). * * * If no arbitration has been initiated within the prescribed period, the amounts demanded are "due and owing on the schedule set forth by the plan sponsor" and subject to a plan sponsor's suit for collection. *Id.* § 1401(b)(1). If the employer fails within 60 days to meet a payment (following notice of that faliure), section 1399(c)(5)(A) deems the employer to be in default and allows the plan sponsor to "require immediate payment of the outstanding amount of an employer's withdrawal liability." *See id.* § 1399(c)(5).

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[3] The Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (codified in relevant part at 29 U.S.C. §§ 1001-1381 (1982 & Supp. IV 1986), as amended by The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1208 (codified in relevant part at 29 U.S.C. §§ 1381-1461 (1982 & Supp. IV 1986)).

The Court then stated the issue between the parties and quoted pertinent portions of the statutory language which governs civil actions for withdrawal liability (A. 4-5):

> The parties are in dispute as to the time bar upon plan sponsor suits to collect withdrawal liability. Section 1451, which governs civil actions for withdrawal liability, provides that "[a] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." *Id.* § 1451 (a)(1). The same section contains the limitations provision, the meaning of which is pivotal to this case:
>
> > An action under this section may not be brought after the later of—
> >
> > (1) 6 years after the date on which the cause of action arose, or
> >
> > (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.
>
> *Id.* § 1451(f).

A unanimous panel of the Court of Appeals held that a "plan is 'adversely affected' (and thus that a 'cause of action' arises) when the plan has not received payments which are due and owing." A. 8. This conclusion was reached in a thoroughly reasoned opinion for the Court by Judge Starr. As the opinion explained (*id*):

> The language of the statute (including the terms of section 1451 itself) points firmly in the direction of

> the conclusion that Sandoz's uncured failure to pay the sum demanded adversely affected the plan, thus giving rise to a cause of action. See 29 U.S.C. §§ 1399(c)(5), 1401(b). Additional support emerges in the statute's pervasive distinction between withdrawal liability and a plan's ability to receive payment of portions or the entirety of that sum. [Footnotes omitted.]

The remainder of Part II A of the opinion elaborated on these propositions (A. 8-13). Part II B of the opinion (A. 13-18) addressed each of Sandoz's (petitioner here) arguments for the proposition that the cause of action arises on an employer's complete withdrawal from participation in the plan. Part III of the opinion discusses the importance of arbitration in the statutory scheme and makes clear that Petitioner (and any other employer) may raise in arbitration the objection that the plan delayed unnecessarily in making a demand for payment.

ARGUMENT

The Petition for Certiorari does not assert that there is a conflict between the decision of the Court of Appeals in this case and a decision of this or any other court. Rather, the Petition is devoted to the contention that the Court of Appeals erred. Of course, that presents no sufficient reason for review by this Court. In any event, the Petition merely recycles arguments which were directly addressed and correctly rejected in the thoughtful decision of the Court of Appeals.

1. The heart of the matter is that under the MPPAA, an employer's withdrawal from a plan is not wrongful and does not give rise to a suit by the plan against the employer. (See, *e.g.*, A. 10: "By virtue of withdrawal alone (apart from the liability calculation and demand for payment), the employer is not immediately obligated to make payments, nor is the plan by virtue of withdrawal alone entitled to receive any such payments.") It

is the failure to make payments on the plan sponsor's demand which gives rise to suit. Accordingly, the "statute's express terms link a plan's ability to pursue judicial relief to an employer's failure to meet a payment demanded by the plan." A. 8, quoting 29 U.S.C. § 1401(b)(1). Section 1451(f)(1), which is at issue here, provides that a suit must be brought within "six years after the date on which the cause of action arose." Given the statutory scheme just described, that occurs when payment is demanded and refused, *i.e.*, when the plan is entitled to sue:

> [T]he plan sponsor's demand for payment triggers the employer's obligation to pay, and the employer's failure to make the scheduled payment in turn provides the predicate for a plan sponsor's suit. That is to say, the failure to pay gives rise to a cause of action. [A. 9.]

2. Petitioner's main thesis is that, unless the statute of limitations begins to run at the time of withdrawal, pension plans can wait indefinitely before claiming withdrawal liability and confront withdrawing employers with stale claims, and that the ruling deprives the funds of any incentive to collect withdrawal liability payments promptly in accordance with the congressional intent. *E.g.*, Pet. 8-9, 11, 16-17. The same argument was raised below (see A. 15) and decisively rejected by the Court. As the Court said: "There is no indication that the Act requires, as Sandoz would have it, either prompt collection or no collection at all." A. 16. The Court

> decline[d] to mandate the triggering of the limitations period at a moment (complete withdrawal) when for reasons both practical and epistemological [citing the Court's discussion of the language and structure of the Act], the plan may not be expected immediately to assess and demand withdrawal liability. We favor, instead, the moment that most ensures that plans will be able to collect the sums that employers owe them. [A. 16.]

Moreover, "the nature of a limitations period does not require the result that Sandoz favors," and "the Act's general policies, * * * actually disfavor impediments to collection." *Id.* "Congress could have precisely limited the period that might elapse between the employer's complete withdrawal and the plan sponsors' demand for payment, but the national Legislature instead required only that plan sponsors act 'as soon as practicable after an employer's complete . . . withdrawal. 29 U.S.C. § 1399 (b) (1)." A. 16-17.

Finally, petitioner's argument "discounts the significant incentives that will, in the usual case, induce plan sponsors to act promptly to calculate, schedule, and demand payment of withdrawal liability". A. 17. Specifically: (a) "The plan sponsor that unduly delays in taking appropriate action puts at risk the solvency of the plan and thus may invite a claim for breach of fiduciary duty;" (b) "A delinquent sponsor may always be met in arbitration (as the plan sponsor in this case may well be met) * * * with the argument that the plan has by virtue of delay run afoul of the Act's command that the plan sponsor demand payment of withdrawal liability 'as soon as practicable after the employer's complete . . . withdrawal.' 29 U.S.C. § 1399(b)." (See also A. 19); (c) "Finally, although the issue is far from settled, the plan through delay may forfeit its claim to interest accrued during the period from complete withdrawal to demand for payment." *Id.* However, it is not the function of the limitations provision, § 1451(f), to enforce the policy embodied in § 1399(b) (1), with the consequence that the plan would receive no payment.

3. Petitioner's other arguments can be dealt with shortly.

(a) Petitioner asserts that the "cause of action arose, within the meaning of Section 1451(f) (1) at the time of withdrawal." Pet. 10, emphasis omitted. This argument,

as the Court below observed, "fails to distinguish between the concept of withdrawal liability (which section 1381 addresses) and the issue when a cause of action arises, thus triggering section 1451(f)'s application to a plan sponsor's suit to recover payments of that liability (which is, of course, the issue before the court)." A. 13. Petitioner asserts that a "fund is *adversely affected* at the time of withdrawal because it is at that time that an employer ceases contributing to the plan." Pet. 11, emphasis in original. This statement is misleading even on petitioner's special use of the underscored words, because although *future* contributions cease upon withdrawal, so does the accrual of liabilities. In any event, the MPPAA does not make it actionable for an employer to withdraw. See p. 4, *supra*. Rather, as the Court explained, a plan is "adversely affected" *in the sense utilized in §§ 1401(b) and 1451* only by a plan's failure to pay. See A.10, 11-12, and pp. 4-5, *supra*.

(b) Petitioner's comparison between the MPPAA and other laws (the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964 (Pet. 13-14), avails it nothing.[4] Under both those statutes (and in the cases cited) the limitations period begins to run when the defendant has committed some wrongful act. To reiterate, under the MPPAA, the wrongful act is the failure to make demanded payments; withdrawal, the event from which petitioner would have the limitations period run, is simply not unlawful.

(c) In contending that the Court of Appeals' construction of the six-year statute of limitations renders the three-year statute in § 1451(f)(2) meaningless (Pet. 14), Petitioner simply disregards the Court's response that this "argument misconstrues the function of sec-

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[4] This argument (of all those made in the Petition) was not dealt with in the opinion below, doubtless because it was not made in the employer's brief (and advisedly so).

tion 1451(f)'s time bar." A. 14. Section 1451 is not limited to a plan sponsor's suit for delinquent withdrawal liability payments, but "applies to suits brought by a wide variety of parties," as the Court demonstrated. A.14-15. Thus, "in a host of claims * * *, § 1451(f)(2) retains independent significance even following our ruling today." A.15.

(d) Petitioner asserts (Pet. 15-16) that there would be no "unwieldy collection mechanism" if the statute of limitations began to run at the time of withdrawal. Even if this were so, petitioner's position could not be reconciled with the design of the statute. However, Petitioner fails to give proper heed to the inherent difficulties of determining when complete withdrawal has occurred. This is true especially in the building and construction industry where Congress has made special provisions for determining what constitutes withdrawal. A. 10-11. A cessation of contributions in this industry, where work is seasonal and transitory, simply does not indicate withdrawal.

(e) Petitioner's final point (Pet. 16-17) has been discussed earlier. See p. 6, *supra*. It bears emphasis that Petitioner ignores the Court's holding (and Respondents' acknowledgement) that it is open to an employer to assert in the statutory arbitration proceedings that the plan sponsors did not act with sufficient expedition. See A. 16, 18-19.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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